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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CHARLES W. LINDENMEIER, et al.
PETITIONERS,

vs.

SIEMENS POWER CORPORATION, et al.
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as a matter of federal law, plaintiffs have pled a claim for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), which is controlled by this Court's resolution of *Varity Corp. v. Howe*, 1996 WL 116994 (March 19, 1996)?

2. Whether, in light of this Court's decision in *Varity* (which eliminated the conflict between the courts of appeal on the issue of whether individual plan participants and beneficiaries can state a claim for breach of fiduciary duty under ERISA), the court of appeals' decision in this case should be reversed and the matter remanded for further proceedings?

PARTIES TO THE PROCEEDINGS

Petitioners are Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, individually and on behalf of a putative class of approximately 600 active and retired employees of Exxon Nuclear Company, Inc. ("ENC"). Respondents are Siemens Power Corporation (formerly Exxon Nuclear Company, Inc., Advanced Nuclear Fuels Corporation, Siemens Nuclear Power Corporation); and Siemens Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, by their undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the court of appeals in this case.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 24, 1995. Petitioners filed a Petition for Rehearing, which the Ninth Circuit denied on December 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 1331, 1337, 2201 and 2202.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are:

29 U.S.C. §§ 1002(1); 1002(2); 1002(3); 1002(5); 1002(16); 1002(19); 1002(21)(A); 1102; 1104(a); 1109; 1132(a); and 1132(c). They are reproduced in the Appendix at App. 105a-115a.

STATEMENT OF THE CASE

Proceedings And Decisions In The District Court

This class action alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, federal common law and state law; a specific claim for breach of fiduciary duty was pled. App. 62a-63a. In this Petition, Petitioners seek relief *only* as to their breach of fiduciary duty claim.

Petitioners, who were the plaintiffs in the court below, brought this action on behalf of approximately 600 hourly and salaried, non-union, active and retired employees of Exxon Nuclear Company, Inc. ("ENC"), who (along with their beneficiaries) were participants in the ENC employee welfare and pension benefits plans and who remained with ENC after a stock sale to Defendants on or about December 31, 1986. App. 37a. As ENC employees, Petitioners sued the then-current incarnation

of ENC, Siemens Power Corporation ("SPC").[1] In connection with the stock sale and pursuant to an express contractual promise, Defendants[2] agreed to continue to provide ENC employees with the same or equal pension and welfare benefits that they were entitled to receive prior to the stock sale. Defendants made this express promise in consideration for the employees' agreement to continue their employment with ENC after the stock sale. *See* App. 38a.

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[1]SPC is the successor to all of the interests and obligations of ENC. SPC was previously called Advanced Nuclear Fuels Corporation ("ANF") and Siemens Nuclear Power Corporation. SPC was at different times a wholly-owned subsidiary of Siemens Corp., Siemens Capital Corporation ("Siemens Capital") and Siemens Kraftwerk Union Aktiengesellschaft, Inc. ("KWU"). App. 40a. (Collectively "Defendants").

Siemens Corp., a Delaware corporation, is a holding company for power generation operations located in the United States and owned and operated by Siemens, A.G., the parent company located in Munich, Germany. Following its purchase of ENC, KWU transferred the stock of what is now SPC to Siemens Capital, which ultimately merged into Siemens Corp. In or about September 1988, Siemens Corp. succeeded Siemens Capital as the sponsor and administrator of the pension and welfare benefit plans involved in this class action. App. 41a. Defendants are SPC (formerly ENC) and Siemens Corp. Plaintiffs have at all times worked for the same entity, ENC renamed SPC.

[2]To provide a convenient nomenclature for Defendants, Petitioners collectively grouped and labeled Defendants as "Siemens" in the Complaint and in briefing before the district court and the court of appeals. This reference may have contributed to the artificial line of demarcation the lower courts found between ENC and SPC where no difference in the entity existed.

In connection with this stock sale, Petitioners claimed that their ERISA rights had been violated. Defendants provided benefits as promised for more than five years, at which time they unilaterally renounced these agreements and reduced or eliminated Petitioners' pension and welfare benefits in violation of ERISA. App. 52a.

The district court entered a Judgment on Decision in which it granted Defendants' Rule 12(b)(6) Motion to Dismiss on all nine counts. The district court did not grant Petitioners leave to amend their Complaint. Petitioners filed a Motion for Reconsideration which the district court denied in its Order on Motion for Reconsideration. App. 16a-35a. The district court construed Petitioners' Motion for Reconsideration as a motion to amend the Complaint and found "that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint." App. 34a. In addition to denying Petitioners the opportunity to replead, the district court permitted only very limited discovery which occurred shortly before the hearing on the Motion to Dismiss. App. 81a-85a.[3]

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[3]The lack of adequate discovery and denial of leave to amend precluded plaintiffs from alleging additional facts contradicting the district court's factual holdings. An example before this Court is a document from which plaintiffs' counsel read out loud during oral argument in the Ninth Circuit. That December 24, 1986 plan document was adopted one week before the closure of the sale. It differs materially from documents the district court held controlling. Plaintiffs' counsel explained that the document came into plaintiffs' possession shortly before the hearing on the Motion to Dismiss and that it contained different language than that relied upon by the

Among their ERISA claims, Petitioners alleged a claim for breach of fiduciary duty. App. 62a-63a. Petitioners alleged facts showing that in their fiduciary capacity ENC/SPC made representations to Petitioners that their welfare benefits and pension benefits would remain the same after the stock transfer and that by these representations, defendants lured them into remaining at ENC after the stock transfer. *See* App. 43a-51a. Petitioners also alleged that Defendants owed them a fiduciary duty under ERISA and that Defendants failed to "discharge that duty solely in the interest of the plans' participants and beneficiaries...." App. 62a. Hence, Petitioners alleged similar facts to those alleged by the plaintiffs in *Varity Corp. v. Howe*, 1996 WL 116994, 3-8 (March 19, 1996), and relied upon the same statutory authority for that claim. *Id.* at 11.

The Court of Appeals' Decision

The Ninth Circuit affirmed the district court's dismissal without leave to amend of Petitioners' claims for violations of ERISA, federal common law and Washington state law arising out of Defendants' elimination and reduction of pension and welfare benefits.

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district court. App. 81a-85a. Petitioners were also precluded from amending to allege other facts including that this document identified ENC's Manager of Employee Relations as a named fiduciary.

Factual Background

The promised benefits provided that Petitioners' pension and welfare benefits would vest upon the attainment of "annuitant status," which was defined as 55 years of age and 15 years of employment. *See* App. 43a-44a. The parties agreed that retaining ENC's employees was crucial to both the success of the acquisition and the continued success of the acquired company. App. 43a-45a.

Throughout the negotiations for the stock sale, Defendants repeatedly represented, promised and agreed that in consideration for continued employment at ENC by Petitioners and the members of the Class, Defendants would continue to provide Petitioners with pension and welfare benefits which were the same as or equal to the benefits previously provided upon attainment of "annuitant status." *See* App. 43a-45a. Defendants' lead negotiator, Helmut Pekarek ("Pekarek"), articulated this promise to ENC's senior management which Pekarek intended and expected to be transmitted, in turn, to all of ENC's employees. App. 43a-44a.

With Defendants' participation, knowledge, authorization, approval and intent, ENC relayed the express promises and reassurances to ENC's employees that the employees' pension and health care benefits would remain the same after the stock sale. *See* App. 44a-51a. As in *Varity*, ENC provided Petitioners with a side-by-side comparison of the new and old benefit programs. App. 46a-48a. Indeed, the cost of these

benefits was calculated and factored into the acquisition price paid by Defendants to acquire the ENC employees and the purchase price was reduced to account for the benefits. *See* App. 43a-51a. These representations were adopted and ratified by Defendants both before and after the purchase. App. 43a-53a.

ENC communicated the promised benefits on multiple occasions. App. 45a-48a. On December 23, 1986, ENC's Employee Relations Manager, R.J. Borgmeier, the named fiduciary, distributed company-wide his memorandum announcing that:

> The company's objectives have been to maintain the current level of benefits and to make only those changes that are required to accommodate the change in shareholder. We are pleased to inform you that we have been able to accomplish this and believe that our employees will enjoy basically the same benefits as before the change in shareholder.

App. 48a. Borgmeier further represented that this ENC plan "will provide a result that, when combined with your Exxon annuity, will be equal to the annuity you would have received if you had remained in the Exxon annuity plan." App. 48a-50a. Borgmeier and his staff represented that these benefits would be provided for the employees' careers at ENC. Thus, Pekarek's promises on behalf of the new shareholder were adopted and represented by the ENC named fiduciary.

The day after ENC circulated the Borgmeier memorandum to its employees, by resolution, the ENC Board adopted the master plan which contemplated that there would be a number of additional texts. This master plan, the written Borgmeier representations and the accompanying oral representations were all made by ENC acting as a fiduciary.

In September 1991, however, Defendants reneged on the above-referenced promises, representations and guarantees and unilaterally announced that benefits would be revised effective September 30, 1991. Over the next several months, Defendants (1) reduced benefits available to employees who had attained annuitant status but elected to retire after January 1, 1992; (2) reduced benefits without option to employees who had not attained annuitant status; (3) terminated (for active employees) and reduced (for retirees) benefits available under Survivor Income Benefit Insurance; and (4) reduced and eliminated certain medical benefits that had previously been available to active employees. App. 53a-56a.

REASONS FOR GRANTING THE PETITION

This Case Should Be Resolved In Accordance With *Varity*

Petitioners pled a claim like the one recognized by this Court in *Varity*. Petitioners have pled and can articulate a claim virtually identical to the claim stated in *Varity*; the Ninth Circuit and the district court rejected Petitioners' fiduciary claim. Petitioners seek to benefit

from the Court's decision in *Varity*; however, Petitioners will not have the benefit of the decision in *Varity* unless this Court grants this Petition.

A breach of fiduciary duty claim arises where a plan fiduciary breaches statutorily-defined duties or where it issues misleading communications regarding the plan. *Varity*, 1996 WL 116994 at 10-11 ("To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act 'solely in the interest of the participants and beneficiaries.'"). A fiduciary must discharge his or her duties solely in the interest of the participants, for the exclusive purpose of providing benefits to participants, with care, skill, prudence and diligence. 29 U.S.C. §§ 1104(a), 1106. Here, Petitioners have alleged *both*. App. 44a-51a, 61a-63a.

This Court in *Varity* held that individual plan beneficiaries have a right of action under ERISA for breach of fiduciary duty. *Varity*, 1996 WL 116994 at 11. In that case, the corporate fiduciaries breached their duties of disclosure by providing incomplete, confusing, evasive and deceptive answers to the employees, including merely stating that "benefit programs will remain unchanged." *Id.* at 4, 6-7. This Court recognized plaintiffs' breach of fiduciary duty claim under ERISA for defendants' misrepresentations. *Id.* at 10. This Court reasoned that:

> [l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section

404(a)(1) of ERISA.

Id. (citation omitted). Thus, this Court's opinion in *Varity* makes it clear that the breach of fiduciary duty claims asserted here by Petitioners arise under ERISA. *Id.* at 3.

The Petition in this case should be granted and the case remanded to the court of appeals. The court of appeals should then remand for further proceedings consistent with this Court's ruling in *Varity* on the issues of fiduciary breach.

ERISA Provides A Statutory Basis For Relief For Defendants' Misrepresentations And A Direct Right Of Action For Participants Or Beneficiaries

In *Varity*, this Court now recognizes that individuals (such as Petitioners) enjoy private actions for fiduciary breaches under ERISA. *Id.* at 11. This Court granted Certiorari in *Varity* to resolve the intercircuit dispute on this issue which reverses the Ninth Circuit's rule. *Id.* at 4.

Claims under Section 1132(a)(3) contain no limitations of those subject to suit thereunder. Thus, any decision prohibiting participants and beneficiaries -- who are expressly given standing to sue -- from bringing claims under Section 1132(a)(3) against fiduciaries and alleging a breach of their fiduciary duty would run afoul of the carefully crafted and reticulated enforcement scheme, consistent with this Court's decision in *Varity*.

The remedies provided by Section 1132(a)(1) (to

recover benefits due under a plan) and Section 1132(a)(2) (which recognize a remedy running *only* to a plan) do *not* provide relief in the myriad situations in which a fiduciary commits a severe breach of the fiduciary duties established by ERISA. *Varity*, 1996 WL 116994 at 16. Petitioners, who were lured into remaining employees of the entity after the stock transfer and foregoing their rights, have a claim under Section 1132(a)(3). Indeed, Petitioners' Complaint cites this section of ERISA in their breach of fiduciary duty claim. App. 58a-62a.

Conversely, the Ninth Circuit's memorandum shows a fundamental confusion as to Defendants and their fiduciary duties to Petitioners. App. 10a-11a. Defendants, in this case, acted in a fiduciary capacity and not only in their capacity as the employer.[4]

Correspondingly, Defendants did breach their fiduciary duty as Petitioners allege. The ENC entity remained constant as it traveled through different ownership and different names. Petitioners are employees of that entity. Petitioners remained participants or beneficiaries of benefit plans sponsored by that same entity. ENC, later called ANF and SPC, was the company whose agents, including the named fiduciary,

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[4] *See Varity*, 1996 WL 116994 at 9 ("We conclude, therefore, that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the district court's legal conclusion that *Varity* was acting as a fiduciary.")

Borgmeier (who continued as Manager of Employee Relations of SPC after the stock sale), made representations relied upon by Petitioners. The name changes are not relevant to Petitioners' rights. In its capacity as a fiduciary, ENC/SPC's representations before and after the stock sale are actionable. *See* App. 43a-53a, 62a-63a. Through Defendants' subsequent adoption and ratification after the stock sale, Petitioners state a breach of fiduciary duty claim after the stock sale. Contrary to the conclusion of the district court, Petitioners alleged affirmative and material misrepresentations after the stock sale. App. 52a-53a.

In this case, the stock purchase closure date is not determinative. Likewise, changes of name and the dominant shareholder do not modify the representations' character as fiduciary representations upon which employees are entitled to rely. Thus, "Siemens" did not *become* a fiduciary as the court of appeals states in its memorandum (App. 11a.); *at all times*, ENC/SPC was a fiduciary. Representations made by a fiduciary are actionable irrespective of whether they were made before or after the stock sale.

In short, the court of appeals and district court misconstrued Petitioner's Complaint. App. 10a and 25a. The facts pled in the complaint as well as more recently discovered facts support the position that even if Defendants are not liable for their direct representations to Petitioners, they are responsible because they knowingly provided false information to ENC Management, which in turn was communicated to

Petitioners by the named fiduciary, the ENC Manager of Employee Relations. Hence, Defendants duped Petitioners into remaining with ENC after the stock sale by conveying misrepresentations through ENC, the named fiduciary during the negotiations.

Petitioners alleged in their Complaint that ENC/SPC breached its fiduciary duties under ERISA in its administrative role of communicating about the plans, consistent with this Court's ruling in *Varity*. *Varity*, 1996 WL 116994 at 3, 6, 8-10. Thus, ample facts have been pled showing that Defendants breached their fiduciary duties owed to Petitioners and other class members. App. 52a-53a, 62a-63a.

CONCLUSION

The Petition for a writ of certiorari should be granted and the case reversed and remanded for further proceedings in accordance with *Varity*.

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